

**STATEMENT OF WILLIAM P. HORN
BEFORE THE
SUBCOMMITTEE ON NATIONAL PARKS
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES**

December 14, 2005

Mr. Chairman: My name is William P. Horn and I appreciate the invitation to appear before the Subcommittee to discuss National Park Service (NPS) Management Policies and the 1916 National Park Service Organic Act.

INTRODUCTION

It was my privilege to serve as Assistant Secretary for Fish, Wildlife and Parks under President Reagan and work on the development and articulation of appropriate NPS management policies consistent with the 1916 National Park Organic Act. We are blessed with an incomparable National Park System that millions of our citizens use, enjoy and cherish. Maintaining and enhancing this broad public support for our Park System through sound management is the key to assuring the conservation of its resources for future generations.

Any inquiry into NPS Management Policies must start first with the 1916 Act. Its basic mandate is to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations” and management policies and actions must adhere to and fulfill that mandate. Unfortunately, there are interests and advocates who seek to effectively rewrite this basic statutory mandate and impose park policies that focus on only one half of the original Congressional admonition. These same interests often pose the basic policy issue in a form overtly hostile to traditional visitor use: “are we wise enough to support” management that “preserves natural wonders for our children by preserving them from us.”¹ Contrary to these interests, Congress has never intended that parks be managed as “biospheres under glass” or managed in an exclusionary manner.

Management policies that genuinely reflect the law must appropriately recognize both elements of this single mandate. To achieve this goal, it is critical that the 2001 NPS Policies be rewritten in manner consistent with the Organic Act. As detailed later in this statement, the 2001 Policies misrepresented the 1916 Act from the outset and irretrievably set those policies on a wrong and illegal course. I commend the leadership at NPS and Interior for engaging in the legally necessary rewrite of NPS policies.

There has also been a lot of misguided rhetoric about the process used to prepare the proposed rewrite. Suffice it to say that NPS policy has always been within the purview of the Assistant Secretary’s office. Prior Assistant Secretary’s under Presidents Carter, Reagan and Clinton have played a hands on role in the development of NPS Management Policies. Indeed policy rewrites that occurred in the 1970s under the Carter Administration, in 1987-1988 under

¹ F. Cheever, 74 Den. U. L. Rev. 625, 1997.

President Reagan, and in 2000-2001 under the Clinton Administration saw active involvement from each Administration's political appointees. To pretend shock that setting policy involves politics is akin to Claude Rains' line in the movie Casablanca stating "I'm shocked – there's gambling going on here" as he pockets his winnings. It is fully appropriate to debate the merits of Management Policies whether from 1988, January, 2001 or today. Expressing dismay that political policy makers have a role in setting policy is just silly.

1916 Act

The 1916 Act was the product of four years of intense Congressional deliberations involving critical opinion leaders of the day such as Frederick Law Olmstead, Jr. (the designer of New York City's Central Park) and Stephen Mather (later first Director of the National Park Service). Although National Park units had been in existence since 1872 (i.e., Yellowstone), there was no unified management of these units nor any mission statement to govern and direct management. Indeed, there was no National Park Service and units like Yellowstone were administered by the U.S. Army. A battle was also underway to resolve whether parks management should be lodged within the Department of the Interior or committed to the U.S. Forest Service, created in 1905, then headed by Chief Gifford Pinchot. The 1916 Act was designed to correct these deficiencies and resolve this critical bureaucratic dispute.

In addition, President Teddy Roosevelt's bold actions and articulation of conservation policy were already a decade old. The National Forest System and the U.S. Forest Service had been created. Similarly, Roosevelt had begun the National Wildlife Refuge System in 1903 dedicated to conserving biological (i.e., fish and wildlife) resources. The nascent Park System had just suffered the bruising Raker Act battle that authorized the construction of Hetch Hetchy Dam within Yosemite National Park. Park proponents wanted to maintain the impetus from the Roosevelt years and protect against other Hetch Hetchy's.

Two of the primary interests supporting the 1916 Act were the railroad and automobile industries. The Act was seen as a means of facilitating opportunities to enjoy scenic vistas and encourage tourism. Only the year before, Yellowstone's road system, built by the U.S. Army, had been opened to auto traffic with much fanfare.

It is reported that Olmstead authored the basic mandate included in the Act: "...the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will them unimpaired for the enjoyment of future generations. " 16 U.S.C. § 1, Aug. 25, 1916. Particular attention must be paid to the specific language adopted by Congress. Note first that it is articulated as a SINGLE PURPOSE (i.e., "which purpose is"); it is not two purposes with one primary and the other subordinate. Congress also prescribed that resources be "conserved" rather than "preserved." The term "conservation," as articulated in that era by the likes of Teddy Roosevelt, included elements of use in contrast to the more preservation-oriented rhetoric of John Muir, founder of the Sierra Club. Note too that the resources singled out for conservation are tangible matters: scenery, natural and historic objects, and wild life. Of critical importance is the express purpose of conserving

resources and leaving them unimpaired: to leave them in that state “for the enjoyment of future generations.”

Public use and enjoyment is inextricably embedded in the single fundamental purpose of our Park System. Moreover, ensuring future use is the underlying purpose of the non-impairment standard. To argue that “resource preservation” is the single, dominant overarching purpose of the 1916 Act, to the detriment of visitor use and enjoyment, is simply wrong and not borne out by a close reading the actual statutory language.

The debate over section 1 always focuses on its famous last phrase. Additional meaning, however, can be gleaned from earlier parts of the provision. The beginning of the sentence gives the charge to the then new National Park Service: “The service thus established shall PROMOTE AND REGULATE THE USE of the Federal areas known as national parks.” (Emphasis added.) A statute that expressly admonishes NPS to promote use and assure visitor use and enjoyment can hardly be read to authorize exclusionary preservation policies.

A close reading of section 3 of the Act further demonstrates “preservation” per se was far from the minds of the 1916 Congress. Section 3, still part of the U.S. Code (16 U.S.C. § 3), expressly authorizes forest management when needed to “control the attacks of insects of diseases or otherwise conserve the scenery or the natural or historic objects” in any park. Similarly, it provides authority for the “destruction of such animals and of such plant life as may be detrimental to THE USE OF any said parks.” (Emphasis added.) In addition, the section provides the original authorization for the concessions program to facilitate public use and allows grazing within parks, except Yellowstone, when deemed “not detrimental” to the primary purpose for which a park is created. Overall this is a mandate for an active management program to facilitate public use and enjoyment of the Park system. No intellectually honest reading of this Act can support the notion of treating large “natural” units of the Park System as unmanaged, untouched biological preserves with visitors to be kept on the other side of the glass or fence.

1978 Act

Congress supplemented the 1916 mandate with 1978 amendments to the Organic Act by enacting a key sentence in a new section: “The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for these areas have been established....” 16 U.S.C. § 1a-1. Federal courts have essentially deferred, pursuant to the Chevron standard, to a permissible agency interpretation that this language provides more emphasis on resource conservation. I would note though that Congress did not amend the original section 1 language and added this supplemental provision in a separate section of the law. It creates no conflict with the original mandate other than to add a new term, “derogation”, which many construe as a synonym for “impairment.” The proposed Management Policies appropriately, and permissibly, treat these terms as one standard. (See 1.4.2).

Management Policies

It is critical the NPS Management Policies 2001 be rewritten consistent with the 1916 Act. Those policies got the law wrong from the very outset: the opening “Foundation” of the policies states “The National Park Service must manage park resources and values in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.” It is intellectually dishonest, and contrary to law, to deliberately delete from this paraphrase of the Organic Act the express references to the “enjoyment of the same.” The 2001 Policies distort the law from the very beginning and never recover. In contrast, the proposed Policies accurately reflect the actual law and Congressional intent. (See 1.1). By getting it right from the start, the proposed Policies do not veer off from the course charted by Congress nearly a century ago.

Impairment

The only substantive prescription in the 1916 Act is to assure that park resources are “unimpaired” and definition of this term has become key. Those seeking to restrict public use and enjoyment invariably define “impairment” so broadly that a vast array of traditional park visitor activities can be deemed to cause impairment and, therefore, be prohibited. For example, the Clinton Administration’s rewrite of NPS Management Policies stated “AN IMPACT TO ANY PARK RESOURCE OR VALUE may constitute impairment.” (Emphasis added.) NPS Management Policies 2001, 1.4.5.

The same policies go on to provide that an “impact” that simply “affects” a resource or value can also constitute impairment. *Id.* Lastly, any impact that “would harm the integrity of park resource or values” is proscribed although “integrity” is never defined. *Id.* The 2001 Policies disturbingly note only three kinds of activities that might cause impairment: “visitor activities”; “NPS activities in the course of managing a park”; and “activities undertaken by concessioners, contractors, and others operating in the park.” These are the specific activities expressly authorized in sections 1 and 3 of the 1916 Act (public use and enjoyment, park management to facilitate use, and concessions). Policies that contradict specific Congressional directives are clearly illegal and a rewrite of these misdirected provisions is needed.

As previously noted, the purpose of the non-impairment standard is to conserve resources for future visitor enjoyment. Clearly, the Organic Act was enacted with specific contemplation of active programs to facilitate use and enjoyment and with the clear understanding that some levels of impact or effects on resources would be fully acceptable in pursuit of this objective. It is noteworthy that Yellowstone’s road system was upgraded and opened to automobiles in 1915. At the same time, that Park included a number of grand Victorian hotels to accommodate the public. Demonstrably this kind and level of development was deemed fully acceptable by the drafters of the non-impairment standard especially since Stephen Mather went on to press successfully for similar development in other parks during his post-1916 tenure as NPS Director. One legal historian has written “‘enjoyment reasonably required access and at the time roads, trails, hotels, campgrounds and administrative facilities did not seem unduly invasive. The act cannot have meant that ‘unimpaired’ was to be taken in its strictest sense, particularly since the act included specific

approval for certain inevitably compromising actions: leasing for tourist accommodation was the most obvious example.’’²

In contrast, imagine today trying to build a fraction of Yellowstone’s road system or even one of its historic hotels or lodges. It is an absolute certainty that “impairment”, especially the very low impact threshold in the Clinton-era policies, would be THE basis for objections. Obviously the 233 miles of pavement associated with the famous “Loop” road system and six major visitor services centers (Mammoth, Roosevelt, Canyon, Lake, Grant Village, and Old Faithful) have an “impact” on Yellowstone’s resources. Undoubtedly, the roads, parking lots, boardwalks to thermal features, bridges, cabins, hotels, restaurants, visitor centers, support facilities, employee housing, ranger stations, and headquarters offices have some adverse impact on the natural environment and compromise in some fashion the “integrity” of the same environment. Yet it was decided years ago, fully consistent with the 1916 Act, that such impacts were acceptable to facilitate public use and enjoyment of our first National Park. I would submit that the vast majority of American citizens would still agree that the effects and consequences of these developments do not constitute an illegal impairment of Yellowstone’s wonderful resources.

The 1916 Act clearly contemplates a professional balancing exercise to achieve both parts of its mandate and NPS Management Policies must reflect the same. To that end, the term “impairment” must be defined reasonably and consistently so it does not become a weapon to be used against traditional use and enjoyment. Most Americans find satisfactory the present on-the-ground state of affairs in our Parks regarding visitation and use and would be aghast if they realized that the 2001 NPS management policies effectively define many of these uses as illegal. I would suggest that an appropriate definition of impairment would recognize that some adverse effects are acceptable to facilitate use and enjoyment so long as those effects do not materially or significantly alter ecological processes or have appreciable adverse impacts on scenery, wildlife, and other natural resources. This would be consistent with the “material” impact standard used to define permissible activities on units of the National Wildlife Refuge System (that standard was first adopted by the U.S. Fish and Wildlife Service in the mid-1980’s and affirmed by Congress in 1997).

Fortunately, the definition of “impairment” in the proposed Policies (see § 1.4.5) is consistent with the 1916 Act, its obvious intent, and practical experience derived from a century of park operations. The proposed definition ensures that use and enjoyment will be managed to assure that what we see and enjoy today in our Park System can be seen and enjoyed by our children and grandchildren.

Resources and Values

The 1916 Act also references the conservation of tangible resources: scenery, natural and historic objects, and wild life. In 1978, Congress added that NPS management “shall not be exercised in derogation of the values and purposes” for which Park System units were created. 16 U.S.C. § 1a-1. The same provision makes references to the “high public value” of the System. *Id.* Since then it has become common for some to refer to “resources and values” as if the two are

² R. Winks, “The National Park Service Act of 1916: A Contrary Mandate”; 74 Den. U. L. Rev. 575, 1997.

synonymous. *See* NPS Management Policies 2001; 1.4.6. Advocates have similarly seized on this language to press for more social management by NPS. For example, one commentator writing about “loving them to death” (i.e., Parks) argued that “NPS must refuse the whims and desires of popular demand and instead exert a strong hand ...to create an [visitor] EXPERIENCE worthy of this [1916] mandate”(emphasis added).³ This and other references to “experiences” are illustrative of efforts to insist on more and more social management in the name of resource preservation.

A greater measure of intellectual rigor is needed to ensure that policy decisions regarding public use and enjoyment distinguish properly between tangible resources and more subjective, intangible values including the subjective personal “experiences” of different park users. For example, clean water is a tangible resource. A healthy elk herd is a tangible asset as is a stand of red mangrove trees. In contrast, subjective aesthetic appreciation falls into the category of values. A mountain climber on Denali gets dropped off by ski plane and relishes the silence when the plane departs; he later is disturbed and upset when another plane carrying flightseers passes by prompting him to write NPS demanding restoration of “natural quiet”. In my experience, many of the most contentious Park System management battles involve “values” – disputes among and between user groups over the most appropriate way to enjoy our parks.

Unfortunately, there is a trend toward treating the personal aesthetic values of some users as a resource. By the alchemy of politics, those values get transmuted into “resources” and become the basis for management actions detrimental to other traditional user groups. It is fully appropriate, and necessary, to conserve genuine resources to fulfill the mandate of the Organic Act. That Act should not, however, be misconstrued and be the basis for giving one user group preferred status and prohibiting the activity of another because the former raises aesthetic objections. A public institution such as NPS has an obligation to all of our citizens and should strive to accommodate a variety of park uses and users as long as they do not impair bona fide resources. The authors of the Policy rewrite should be applauded for making clearer distinctions between uses (and users) and resources and values. Both the Natural Resource Management sections (Chapter 4) and the “unacceptable impact” provisions distinguish between resources and values and “appropriate uses.” (*See* 8.1.1; 8.1.2). The improved intellectual clarity that arises from the new language is overdue.

Management of Uses

The proposed NPS Management Policies also do an excellent job in curbing the tendency for managers to opt first for “lock the gate” decisions. A disturbing trend in recent years has been the inclination of park managers to almost immediately select visitor related closures or prohibitions in dealing with use management issues; closures or prohibitions inconsistent with the visitor use mandate of the Organic Act. Instead of seeking to manage uses to conserve resources or to accommodate different users, it has been too easy to simply post a “closed” sign. The proposed rewrite takes a far more professional, and refreshing, approach. It prescribes intermediate steps to manage, mitigate or avoid resource impacts or user conflicts. Only when professional management cannot or will not correct a problem are closures or prohibitions prescribed. (*See* 8.1.2). This is such elemental common sense that it is sure to become controversial.

³ D. Herman, 11 Stan. Envtl. L. J. 3 (1992).

Thank you again for the opportunity to appear today and present this overview of NPS Management Policies and the 1916 National Park Service Organic Act.